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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

* * *

NO. _____

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**W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,**
Petitioner

V.

EARL MABRY, JR.,
Respondent

* * *

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

The Petitioner, W.J. Estelle, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 7, 1976.

OPINION BELOW

The unpublished opinion of the Court of Appeals, *Mabry v. Estelle*, No. 75-2947 (5th Cir. May 7, 1976), appears in the Appendix at 1 [hereinafter cited as (A. _____)]. The Memorandum and Order entered by the District Court for the Northern District of Texas, Amarillo Division, denying and dismissing Respondent's application for writ of habeas corpus

appears in the Appendix at 8.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 7, 1976. A timely petition for rehearing and rehearing en banc was denied on July 19, 1976. (A. 17). A stay of the issuance of the mandate of the Court of Appeals through August 25, 1976, pending petition for writ of certiorari, was granted on August 9, 1976. (A. 19). An extension until October 15, 1976 was granted and this petition for certiorari was filed within the time allowed by the extension of the stay order.

QUESTIONS PRESENTED

1. Whether federal court redetermination of state court factual findings made in the course of a full and fair hearing is a proper allocation of fact-finding responsibility between state and federal courts in federal habeas corpus proceedings for state prisoners under 28 U.S.C. §2254 (d).

2. Whether the harmless error standard applicable to a constitutional error occurring in the conviction phase of a bifurcated trial is also applicable to a constitutional error occurring in the sentencing phase.

STATUTE INVOLVED

28 U.S.C. §2254:

> "(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or

> an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;

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(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

STATEMENT OF THE CASE

Respondent is a state prisoner pursuant to judgment and sentence of the 181st District Court of Potter County, Texas, in Cause No. 15,067-B. He was convicted on August 30, 1971, by a jury upon an indictment charging him with the felony offense of murder with malice and was assessed punishment by the jury at nine hundred ninety-nine years imprisonment in the Texas Department of Corrections. The Court of Criminal Appeals of Texas affirmed the conviction and judgment on April 18, 1973. *Mabry v. State*, 492 S.W.2d 951 (Tex. Crim. App. 1973).

Respondent initially filed an application for writ of habeas corpus in the convicting state court on July 7, 1973. The trial judge did not conduct an evidentiary hearing but filed findings of fact and conclusions of law on February 25, 1974. The Court of Criminal Appeals of Texas denied the application without written order.

Respondent subsequently filed his application for writ of habeas corpus pursuant to 28 U.S.C. §2241,*et seq.*, in the United States District Court for the Northern District of Texas. He contended, *inter alia*, that prior misdemeanor convictions in Florida used by the State of Texas for enhancement purposes were void because he had not been represented by counsel and had not waived counsel when he entered pleas of guilty to those misdemeanor charges. Subsequent pleadings demonstrated that the challenged misdemeanor convictions were not used for enhancement purposes. Rather, the convictions were introduced during the sentencing phase of the bifurcated trial, following a hearing outside the presence of the jury, to show the prior criminal record of the defendant and his general reputation and character pursuant to TEX. CODE CRIM. PROC. ANN. art. 37.07 (1965).

The federal district court found that Respondent was not represented by counsel at the time of the Florida convictions, that he was indigent at that time (contrary to the findings of fact of the trial and appellate courts), and that he had not knowingly and voluntarily waived counsel. The district court found, however, that the introduction of evidence of the prior Florida convictions constituted harmless error as defined in *Chapman v California*, 386 U.S. 18 (1967) and *Harrington v. California*, 395 U.S. 250 (1969), and denied Respondent's petition. *Mabry v. Estelle*, No. CA-2-74-86 (N.D. Tex., May 29, 1975); (A. 8).

Respondent appealed to the United States Court of Appeals for the Fifth Cricuit which subsequently reversed the district court and remanded for entry of an order directing that Respondent be released or retried within a reasonable time. *Mabry v. Estelle*, No. 75-2947 (5th Cir., May 7, 1976); (A. 1).

Petitioner's timely application for rehearing and rehearing en banc was denied on July 19, 1976. (A. 17). A stay through August 25, 1976, pending petition for writ of certiorari was granted on August 9, 1976, (A. 19) and an extension of the stay until October 15, 1976 was granted.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Misconstrues The Allocation Of Fact-Finding Responsibility Between State And Federal Courts In Federal Habeas Corpus Proceedings For State Prisoners.

The broad scope of federal habeas corpus as a remedy for state prisoners established by lower federal courts following *Fay v Noia*, 372 U.S. 391 (1963) and *Townsend v. Sain*, 372 U.S. 293 (1963) has aggravated the tension in federal-state relations.[1] While the writ serves many indispensible functions in assuring the vindication of federal rights, this Court has recently attempted to accomodate the writ's use to the needs of the federal system without diluting its role in protecting fundamental rights.[2] With respect to making these

[1]Wright and Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE L. J. 895 (1966).

[2]*Stone v. Powell*, ____ U.S. ____, 96 S.Ct. 3037 (1976); *La Valle v. Rose*, 410 U.S. 690 (1973).

accomodations in disputes concerning the facts underlying federal claims, federal courts should redetermine the facts only when the state has failed to find the facts after a "full and fair" hearing as defined in *Townsend v. Sain, supra*.[3]

Respondent's factual contentions were resolved against him after a full and fair hearing by the state trial court and review by the highest state appellate court. At the sentencing phase of the state trial, the court — after hearing testimony outside the presence of the jury, (A. 27-30) — found[4] that Respondent was not

[3]Although 28 U.S.C. §2254(d) spells out eight grounds for rebutting the presumed validity of state court fact findings, the heart of the review power is that the state prisoner was not afforded a full and fair hearing on the disputed facts.

[4]The finding against indigency by the state trial court was implicit in its decision to admit evidence of the two prior misdemeanor convictions. Findings need not be explicit to satisfy the requirements of 28 U.S.C. 2254(d). As the court in *La Valle v. Rose, supra*, stated:

> "Although the state trial judge did not specifically articulate the basis in federal law for his decision, it can scarcely be doubted from the court's decision that Respondent' factual contentions were resolved against him." *Id.* at 314.

The *La Valle* court also quoted the following from *Townsend v. Sain, supra*:

> "[T]he coequal responsibilities of state and federal judges in the administration of federal constitutional law are such that we think the [federal] district judge may, in the ordinary case *in which there has been no articulation*, properly assume that the state trier of fact applied correct standards of federal law to the facts, in the absence of evidence... that there is reason to suspect that an incorrect standard was applied."

Id. at 314-315. (Emphasis added).

indigent at the time of his prior convictions for serveral misdemeanors including two for carrying and discharging a firearm within the city limits. The judge then barred the introduction of evidence concerning any prior convictions except those involving the illegal possession of a firearm, as the other prior convictions were immaterial to the assessment of Respondent's sentence. (A. 31-33). On appeal, the Court of Criminal Appeals concluded that "in the absence of a showing of indigency, the trial court was not in error in permitting the proof of the two prior misdemeanor convictions in Florida". *Mabry v. State*, 492 S.W.2d 951, 954 (Tex. Crim. App. 1973); (A. 21,25).

Notwithstanding this full and fair hearing of Respondent's factual contentions, the federal district court ordered an evidentiary hearing. The only evidence offered by Respondent to meet his burden of rebutting the presumed validity of the state trial court fact-findings was his testimony — which was contradictory to his state trial court testimony on indigency. *Compare* (A. 27-30) *with* (A. 34). The federal district court, in contradiction to the state trial court, declared that Respondent was indigent at the time of his prior attorneyless convictions. The court concluded, however, that the error in admitting the uncounseled Florida misdemeanor convictions as evidence during the punishment phase of the trial was harmless beyond a reasonable doubt. The court based this holding on two facts:

> 1. "The jury had rejected [Respondent's] claim of self-defense and determined that [Respondent] was guilty of murder with malice.
>
> 2. "The facts reflected by the record show a senseless killing which could easily have supported a determination that the death penalty was proper." *Mabry v. Estelle*, No. CA-2-74-86 at 4 (N.D. Tex., May 29, 1975); (A. 15).

Although the district court judgment favored the Petitioner, that court should never have reached the harmless error issue. The state trial court's findings, presumptively valid after a full and fair hearing, were not rebutted by Respondent's testimony. The federal court's contradictory finding on the indigency question seriously upsets the balance between the fact-finding responsibilities of state and federal courts in federal habeas corpus proceedings for state prisoners. As this Court noted in *Stone v. Powell, supra*:

> "Resort to habeas corpus, especially for purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government. They include (i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded." *Id.* at 3050, n.31.

In cases such as Respondent's, a convicted defendant is asking society to redetermine an issue that has no bearing on the basic justice of his incarceration. What can be gained by retrying Respondent, whose criminal behavior was so outrageous that the federal district judge felt confident that a sentence of death could have been supported? Judicial resources would be squandered; state court factual determinations would not be final until the federal habeas corpus remedy was exhausted; friction would be increased between federal

and state systems of justice; and the constitutional balance upon which the doctrine of federalism is founded would be upset.

To be sure, the right to counsel is one of our most cherished constitutional rights. Guaranteeing this right is considered critical to insuring the reliability of the fact-finding process. But how can a mechanical insistence on reversal improve the reliability of the fact-finding process when Respondent, *while represented by counsel below*, admitted the very facts in question in the counselless prior convictions?[5]

A more restricted review of state court factual findings in federal habeas corpus is certain to provoke argument. As this Court noted in the context of federal habeas corpus review of state court applications of the Fourth Amendment:

> "The argument is that state courts cannot be trusted to effectuate Fourth Amendment values through fair application of the rule, and the oversight jurisdiction of this Court on certiorari is an inadequate safeguard. . . .[*W*]*e are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States.* State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 341-344 (1816). Moreover, the argument that federal judges are more expert

[5]During the evidentiary hearing in federal district court, Respondent, in describing his prior conviction, stated:

> "I didn't run away from the police; *after I fired the pistol*, I just ran by where I was staying at and threw it to my girlfriend and I just kept on running out in the bushes. . . ."

Record at 12, lines 7-10, *Mabry v. Estelle*, No. CA-2-74-86 (N.D. Tex., May 29, 1975). (Emphasis added).

> in applying federal constitutional law is especially unpersuasive in the context of search-and-seizure claims, since they are dealt with on a daily basis by trial level judges in both systems." *Stone v. Powell, supra* at 3051, n.35. (Emphasis added).

State courts are just as competent, responsible, and experienced in hearing Sixth Amendment claims. As with search-and-seizure claims, trial judges must resolve questions of the admissibility of evidence of prior offenses on a daily basis. Consequently, any argument that federal judges are "more expert" in applying constitutional standards in this area is just as unpersuasive.

The decision of the court below seriously misallocates the fact-finding responsibility between state and federal courts in federal habeas corpus proceedings. This court should grant this petition in an exercise of its supervisory power over lower federal courts as well as to answer a major recurring question in the federal habeas corpus review of state court factual determinations.

II. The Decision Below Fails To Provide A Standard For Determining When A Constitutional Error Committed At The Sentencing Phase Of A Bifurcated Trial Is Harmless.

The now famous case of *Chapman v. California*, 386 U.S. 18 (1967) established the federal standard for determining whether a constitutional error can be found harmless. "[T]he court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24. For errors committed during the *conviction* phase of the trial, the Fifth Circuit has interpreted the *Chapman* standard as "not requiring the setting aside of the state conviction if the evidence of guilt is so overwhelming as to make the error harmless beyond a

reasonable doubt." *Loftis v. Beto*, 450 F.2d 599, 601 (5th Cir. 1971). How the "harmless beyond a reasonable doubt" standard is to be applied to errors committed during the sentencing phase of a bifurcated trial is unclear. Overwhelming evidence of guilt was properly admitted at Respondent's trial. But overwhelming evidence of *guilt* should have little direct effect on the evidence of appropriate *punishment*. Thus the "overwhelming evidence of guilt" interpretation of the harmless error standard seems inapplicable to errors made in the punishment phase of a bifurcated trial.

The interpretation apparently adopted by the Fifth Circuit in *Thomas v. Savage*, 513 F.2d 536 (5th Cir. 1975) is that "an error committed at the sentencing phase of a bifurcated trial is harmless if it has no effect upon the sentence received. . . ." *Id.* at 539. In Respondent's evidentiary hearing in federal district court, the state introduced affidavits from the 12 jurors who convicted and sentenced Respondent saying that the evidence of prior convictions had no effect on their sentence. The federal district judge, after an examination of the Respondent's trial record, stated that "[t]he facts reflected by the record show a senseless killing which could easily have supported a determination by the jury that the death penalty was proper." *Mabry v. Estelle*, No. CA-2-74-86 at 4 (N.D. Tex., May 29, 1975); (A. 15). Yet the court below found that the admission of evidence of the prior counselless misdemeanors was not harmless beyond a reasonable doubt. Assuming *arguendo* that this interpretation is correct, what else must the state show to carry its burden that the admissions of the counselless prior convictions had no effect on the jury

sentence?[6]

Regardless of whether any error that may have been committed was harmless, this court should grant this petition to answer an important federal-law question of first impression which needs to be decided — namely, what standard should be applied in determining whether a constitutional error committed at the *sentencing* phase of a bifurcated trial is harmless?

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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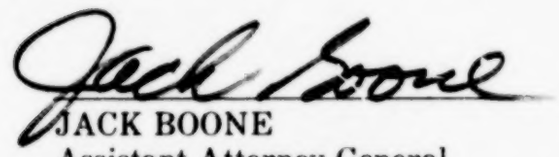

JACK BOONE
Assistant Attorney General

OF COUNSEL:

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[6]Two other facts provide further evidence of the harmlessness of any error that may have occurred. Respondent's accomplice, certainly less culpable, was sentenced to 99 years for murder with malice. *Randolph v. State*, 493 S.W.2d 869 (Tex. Crim. App. 1973). For the purpose of parole eligibility, both persons will be treated as if they had received 60 year sentences. Thus, Respondent's accomplice received effectively the same sentence without the introduction of evidence of any prior offenses.

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CERTIFICATE OF SERVICE

I, Joe B. Dibrell, Jr., a member of the Bar of the Supreme Court of the United States, do now enter my appearance in the Supreme Court of the United States in the above mentioned cause on behalf of the Petitioner. I do therefore certify that three copies of the foregoing Petition have been served by placing same in the United States Mail, First Class, Certified and Postage Prepaid, on this the 30th day of September, 1976, addressed to: Mr. Frederick J. Griffin, 418 South Polk Street, Amarillo, Texas 79109.

JOE B. DIBRELL, JR.
Assistant Attorney General
Chief, Enforcement Division